S. HRG. 100-719, PT. 2

OVERSIGHT OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

HEARINGS

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

EXAMINING THE DEVELOPMENT AND PROMULGATION OF SAFETY AND HEALTH STANDARDS AND THE ENFORCEMENT OF THESE STANDARDS BY THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

APRIL 18, 19, AND 20, 1988

PART 2—ERRATA

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ERRATA

to

OVERSIGHT OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

In the process of being printed, certain essential phrases of some documents submitted for the record were inadvertently blacked out when they were highlighted for the sake of adding emphasis. This document contains the full text, with corresponding page numbers, of the pages where blacked-out sections appeared in the printed record.

The material referred to follows:

EXCERPT FROM A SPEECH BY MR BARRY WHITE

ANOTHER ONE COMING OUT ON WALKING WORKING SURFACES. THIS IS SUBPART D IN THE 1910 STANDARDS. AIMED AT ADDRESSING HOW THEY SHOULD BE KEPT CLEAN, WHAT KIND OF SURFACES YOU SHOULD USE, HOW YOU CAN PREVENT WORKERS FROM FALLING WHEN THEY ARE TRYING TO DO A JOB.

AND FINALLY, A STANDARD ON PERSONAL PROTECTIVE EQUIPMENT. THIS IS EQUIPMENT WORKERS CAN WEAR THAT WILL MAKE IT MUCH SAFER FOR THEM TO WORK.

LOOK AT THESE STANDARDS WHEN THEY COME OUT, READ THROUGH THEM AND IF THEY APPEAR AMAZINGLY STUPID TO YOU OR OVER BURDENING OR JUST NOT USEFUL THEN WRITE IN AND TELL US AND WE WILL MAKE CHANGES IN THEM.

I THINK YOU HAVE THE SAME GOAL THAT WE DO A GOAL THAT WE HAVE HAD SINCE THE ACT STARTED. A MAN OR WOMEN GOES TO WORK IN THE MORNING THEY HAVE A RIGHT TO RETURN HOME AT THE END OF THE DAY IN THE SAME CONDITION THEY WERE WHEN THEY LEFT. AND IT DOESN'T HAPPEN THAT WAY A LOT.

AN AMAZING NUMBER OF PEOPLE ARE KILLED EVERYDAY AT WORK OR INJURED OR GET THE START ON A DISEASE THAT THEY ARE GOING TO CONTRACT, AND WE WOULD LIKE TO MEET WITH YOU AND HAVE AN OPPORTUNITY TO TALK IF WE COULD BE HELPFUL ABOUT SAFETY AND HEALTH PROBLEMS AWAY FROM THE WORK SITE IN OFFICES OR MAIL. WE ARE NOT HAPPY WHEN THE ONLY TIME WE DEAL WITH AN INDUSTRY IS WHEN WE ARE ARGUING OVER A VIOLATION WHEN WE ARE IN A WORKPLACE AND WE START TO FUSS WITH YOU ABOUT WHETHER THERE IS A VIOLATION OF THE STANDARD. IT IS PRETTY

M I N U T E S

POLICY REVIEW BOARD

November 20, 1986

ATTENDEES: Messrs. Baroody, Maroni, Pendergrass, Salem, Adkins, Ms. Attwood, Clair, Copeland, Doranz, Ms. Eckhart, Inzana, R. Johnson, Katen, McCully, Ms. Morris, Siskind, Suhrbier, F. White, Zeutenhorst

Mr. Baroody first asked if OSHA anticipated any difficulties in meeting the schedule of upcoming actions attached to today's agenda. Mr. F. White indicated that OSHA was on schedule for all of the upcoming PRB meetings, except possibly for Medical Surveillance Programs, and he did not know of any problems with meeting the schedule for upcoming regulations. Mr. Baroody asked that OSHA obtain positive confirmation on these matters and give considered comment on the meeting of schedules at the 11/26 PRB meeting.

Hazard Communication Standard in Federal Sector

Mr. Pendergrass said he did not see any problems with the proposal. Mr. McCully summarized it and there was discussion of various points. Mr. Pendergrass noted that OSHA is not insisting on special labels for federal supplies--OSHA wants the same labels as are used in private industry. It was observed that Lane Kirkland and Ken Blaylock have both written to the Secretary in support of the proposal.

Ms. Eckhart asked if the money needed for OSHA's proposal was already in the budget. Mr. Pendergrass indicated it was not, but added that the project could be phased-in to ease the budgetary burden. Ms. Eckhart expressed concern that the Secretary would be sending letters to the agencies seeking their cooperation in a project which would need scarce discretionary funding. Mr. Baroody shared that concern and suggested that OSHA take another look at the matter of the Secretary's letter.

After further discussion, Mr. Baroody concluded that there were no objections to OSHA's going forward with the project. He said they should coordinate budgetary aspects with OMB and adjust the Secretary's letter as needed. He also endorsed inclusion of the project in the President's Management Improvement System.

* * * * * * *

Mr. White stressed that the goal of the proposal is to develop more performance-oriented criteria for respirator use. He noted, however, that it is often difficult to measure the effectiveness of respirators, especially when there are no readily available medical indicators to determine if there has been significant adverse exposure.

Mr. Baroody questioned why mandatory, specific criteria would be needed on fit-testing if employers met the required level of performance. Mr. Pendergrass indicated that OSHA could reevaluate the language on this. Mr. Baroody determined that the question of whether to have a mandatory or nonmandatory appendix has not been resolved and that more time would be needed for consideration of it.

After further discussion by Mr. Adkins of the changes, Mr. Baroody invited MSHA staff to make comments. Mr. Katen described MSHA's policy on respirators. MSHA sets minimum criteria for employers to meet but encourages them to exceed these minima. Mr. Pendergrass and Mr. White affirmed that this is OSHA's basic policy also.

Mr. Baroody then raised an issue that relates to the "Methods of Compliance" item, next on today's agenda. He stressed the importance of setting a new respirator standard that would remain vaild, regardless of how the primary of engineering controls, issue is resolved. The new standard, instead of making a policy statement on engineering controls, could simply reference the part on Methods of Compliance (1910.1) and apply whatever was said there about primacy. This would make for a more durable regulation, whether 1910.1 changes or not. Mr. White agreed to see if the language could be adjusted regarding this.

Mr. Baroody said the Board would revisit the respirator standard as soon as possible and asked that his staff and OSHA schedule the revisitation expeditiously.

Methods of Compliance

Mr. Pendergrass, saying he would have to leave the meeting shortly because of a prior commitment, stressed that in this area OSHA needs to maintain its credibility. Mr. Adkins summarized OSHA's option memo. He emphasized the flexibility of OSHA's current methods of compliance policy. He pointed out that, before citing an employer, OSHA must show that engineering controls were feasible for the worksite in question. He also noted the very low current rate of contests of OSHA all citations--less than 3 percent--and added that the rate for contests involving engineering controls was even less.

Mr. Baroody said that the record cited shows that some employers have a policy of favoring engineering controls, some do not. We asked to what extent the former were driven by OSHA's past policy emphasizing engineering controls. Mr. Pendergrass affirmed that it is a standing axiom of industrial hygiene that engineering controls are preferable to personal protective devices. In response to Mr. Baroody's question, Mr. Adkins felt that OSHA's policy has not driven employer policy on engineering controls.

Mr. Baroody asked why, if OSHA's goal is to produce safety and health results, it should require any particular approach. OSHA stated that it is far easier to measure the effectiveness of engineering controls than of respirators. Mr. Pendergrass said that reliance on personal devices does not always create an acceptable work environment. Mr. White added that engineering a safe environment is inherently better than providing workers with respirators in a toxic one. Ms. Eckhart suggested that there must be cases where engineering controls are not cost-effective. Mr. Salem suggested it be stipulated that, ordinarily, personal devices are cheaper. Mr. Baroody added that we seem to be imposing the most costs on the most productive industries. Mr. White agreed with that but said he had no evidence that requiring engineering controls was seriously hurting any industry.

Mr. Baroody cited some comments by major industries, such as auto manufacturing, that engineering controls were not desirable. Mr. Johnson suggested that OSHA try to work more flexibility into the methods of compliance standard. Mr. White responded that this would compromise safety and health. OSHA cannot say that respirators are as good as engineering controls. Mr. Adkins gave an example of a lead smelter that relied on respirators and the workers had excessive blood lead levels. When engineering controls were installed the levels were cut in half and fell below OSHA's allowable maximum.

Mr. Baroody noted two points in regard to OSHA's options memo. First, the Vice President's Task Force on Regulatory Reform in the early 1980's recommended changes in OSHA's policies. Mr. Baroody, however, did not find any reference to this recommendation in the options memo. Second, he suggested that the hearing record seems richer in industry concerns about engineering controls than OSHA has indicated. He said that more study and discussion will be needed before a decision can be made and he called on ASP staff to work closely with OSHA.

Mr. White observed that the Task Force was primarily reacting to regulatory policies of the previous Administration and said it was not clear what the rationale or intent of its recommendations were in relation to current policy. He stressed that engineering controls are generally the best way to go, but that they can be flexible.

Mr. Maroni recommended that a decision be made quickly. He noted that in confirmation hearings Mr. Pendergrass had pledge that the would support established industrial hygiene practices.

Mr. Baroody asked why OSHA should have a pro-engineering controls policy and then have to make a lot of exceptions to it. He did not question that engineering controls are generally more effective, but argued that personal devices could, in many instances, he equally effective. He asked why OSHA could not simply specify the level of performance required without saying how that level must be reached. Mr. White responded that OSHA has been very flexible in the past and has usually accomodated the concerns that any given industry had about engineering controls. Furthermore, he said, a performance standard is hard to apply where devices like respirators are used because the results in protection are hard to measure.

Mr. Copeland suggest that this issue be revisited at the December 11th PRB meeting. Mr. Baroody agreed, but indicated it should be sooner if possible. He noted that the Vice President's Task Force is being reconstituted and suggested that all concerned find out what new views the Task Force may have on OSHA.

M I N U T E S

POLICY REVIEW BOARD

October 7, 1987

ATTENDEES: Messrs. Baroody, Demarest, Maroni, Pendergrass, Salem, Adkins, Copeland, Droitsch, Ms. Eckhart, Jacoby, R. Johnson, MacLaury, Siskind, Sweezy, F. White

Mr. Baroody opened the meeting at 10:08 a.m. and observed that the only agenda item was OSHA's "Methods of Compliance" proposal. He noted that early in this Administration the Vice President's Task Force on Regulatory Relief had addressed the need for revision in OSHA's methods of compliance. At that time OSHA noted that its generic respiratory protection rule needed attention first. That revision having gone forward, the agency has now turned its attention to methods of compliance.

Mr. Pendergrass circulated at the meeting copies of a draft proposed rule on methods of compliance. He discussed the four options contained in the proposal. Mr. Baroody observed that with that many options the proposal would seem more like an ANPRM. Mr. Baroody noted that OSHA, in a number of specific standards, spelled out instances in which employers were allowed to use methods other than engineering controls to comply. He wondered whether OSHA could not, in a generic fashion, provide this type of flexibility in the methods of compliance standard.

Mr. Pendergrass said that OSHA, through its generic approach to rule-making, was trying to get away from undue specificity in its standards. He stressed that excessive specificity can lead to less, not more, flexibility.

Mr. Baroody noted that in the ETO rule the burden of proof is on OSHA to determine when engineering controls are to be required. OSHA staff pointed out that OSHA generally does have the burden of proof in this area due to the feasibility requirement.

Mr. White said the goal in issuing this proposal was to find out if the regulated community wants OSHA to have an explicitly more flexible policy on methods of compliance. He said that OSHA's policy that engineering controls are primary, where feasible, was generally accepted by the industrial hygiene community. Mr. Pendergrass noted that OSHA's policy is that engineering controls must be used if they are feasible both technologically and economically; if they are not feasible, then OSHA does provide flexibility on the means of compliance.

Mr. Baroody agreed that primacy of feasible engineering controls is proper and accepted OSHA policy. Within that framework, however, he recommended that OSHA seek comments on specific ways in which it could allow flexibility or variation from reliance on engineering controls when such controls are not feasible. He suggested that OSHA narrow its four options down to its number 2, which calls on OSHA to "clarify the circumstances ... under which more extensive use of respirators may be appropriate." Mr. Pendergrass suggested that calling for comments on specific circumstances would invite excessive special pleading from employers. Mr. Baroody stressed that it would be more productive to have detailed comments on a limited number of options than to have more diffuse, diluted comments on a larger number of options.

The PRB recommended that OSHA rewrite its proposal, basing it on option 2 mentioned above. Mr. Baroody and Mr. Salem offered to provide staff assistance to OSHA in developing this revision. The Board indicated that it expects to receive and address the revision by October 31, 1987.

U.S. Department of Labor

NOV 24 1987

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

MEMORANDUM FOR: JOHN PENDERGRASS
ASSISTANT SECRETARY

FROM: CHARLES ADKINS
DIRECTOR
HEALTH STANDARDS PROGRAMS

SUBJECT: Hazard Communication: Response to Issues Raised and Recommended Actions

As you requested, we have reviewed the comments submitted since the final Hazard Communication Standard (HCS) was published on August 24, as well as the transcript of the meeting on the paperwork provisions conducted by the Office of Management and Budget (OMB) on October 16. A detailed summary of both the comments and the transcript were provided to Frank White on October 30. The purpose of this memorandum is to discuss further the more significant issues of concern, our response to those issues, and our recommendations for further action.

As a general matter, we do not believe that any substantive information has been submitted to the record that warrants further rulemaking by OSHA. There are some issues that may need to be addressed through policy statements or enforcement guidelines. It may also be desirable to publish such determinations in the Federal Register to assure the information is available to the broadest possible audience. It is clear from the arguments raised in the comments that there is a considerable lack of understanding among the newly covered industries as to what requirements apply to them, and what is required for compliance. The Agency should be prepared to undertake educational activities for these organizations to assist them.

This memorandum cannot be considered a comprehensive response to the issues raised in the OMB letter. We believe that such a response should be prepared with specific documentation from our rulemaking record. The OMB letter ignores our record, distorts the issues, and contains a number of conclusions that are based on misstatements of fact. That being the case, it is incumbent upon OSHA to prepare a substantive response based on an analysis of the entire record, as well as the Agency's experience in implementation of the current rule.

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

December 10, 1987

MEMORANDUM FOR THE POLICY REVIEW BOARD

FROM: John A. Pendergrass

SUBJECT: Hazard Communication Issues

1) Should OHSA engage in additional rulemaking in response to comments and to the October 28, 1987 OMB letter?

   - o OSHA believes that the comments generated as a result of the publication of the expanded scope Hazard Communication Standard (HCS) on August 24, 1987, do not raise sufficient concerns to compel a reopening of the rulemaking record. (See Attachment 1)

   - o OSHA believes that the issues raised in the OMB letter in some cases could be addressed through interpretations of the affected provisions of the standard and in other cases are not sufficiently supported to justify changes in the standard under the Occupational Safety and Health Act. (See Attachment 1)

   - o In the face of OMB's disapproval of certain "collection of information requirements" of the HCS under the Paperwork Reduction Act, OSHA apparently must undertake a rulemaking to address those issues if the agency wants to implement the disapproved provisions. There is nothing in the record that would preclude OSHA from reopening the HCS record to seek additional comments.

   - o OSHA would propose to undertake additional rulemaking to address those issues raised by the OMB letter. OSHA may raise one or two additional issues. In the rulemaking document, OSHA would not adopt the OMB positions as the agency's proposal, but would present both the current provisions and the OMB positions, with a discussion of the record, for public comment.